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IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-232

DEL RIO FLYING SERVICES, INC.,
a corporation,

Petitioner,

versus

MA DEL CARMEN DBE MANJE, surviving
spouse of Robert S. Manje, Jr.,
deceased, et al.,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

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August 26, 1982

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SUMMARY OF ARGUMENT

The Petitioner failed to present any argument in the trial court concerning a claim that there was a legal presumption of due care on the part of the deceased pilot. Accordingly, as this issue was first raised on appeal, the Court of Appeals correctly disregarded the argument.

The Court of Appeals correctly affirmed the trial court's entry of summary judgment in favor of the Respondents on the issue of liability upon the doctrine of res ipsa loquitur. The trial court correctly applied the doctrine according to Arizona law. The cases cited by the Petitioner are inapposite to Arizona law.

The Petition for Certiorari deals solely with the application of res ipsa loquitur under Arizona law and does not involve an important question of Federal law which should be decided by this court.

ARGUMENT

For the first time on appeal, the Petitioner submitted the issue of whether or not a presumption of due care on the part of the deceased pilot would overcome the inference of negligence which would arise through the application of the doctrine of res ipsa loquitur. This issue was not raised by the Petitioner in the trial court and indeed, it stipulated at the motion for summary

judgment that there was no issue of fact. Accordingly, pursuant to the law of the Ninth Circuit, the Court of Appeals was at liberty to disregard this newly raised issue. United States v. Kabinto, 456 F.2d 1087 (9th Cir.), cert. den., 409 U.S. 842 (1972).

As this case obtains federal jurisdiction through diversity, the applicable law is that of Arizona. Pursuant to Arizona law, the doctrine of res ipsa loquitur is available only where the plaintiff is not in a position to show the particular circumstances which caused the offending agency or instrumentality to operate to his injury. Jackson v. H. H. Robertson Company, Inc., 118 Ariz. 29, 574 P.2d 822 (1978). Upon the stipulation of both parties that there were no remaining facts to be considered, Respondents moved for a summary judgment on liability claiming that as it was undisputed that the crash of this airplane was caused neither by mechanical defects, weather problems nor any act of Respondent's decedent;

therefore, as a matter of law, the negligence of the pilot caused the crash. As there was no Arizona law specifically dealing with the application of res ipsa loquitur to airplane crashes, the trial court correctly reasoned that Arizona would adopt the law of California as found in Newing v. Cheatam, 540 P.2d 33 (Calif. 1975).

The cases cited by Petitioner are inapposite to this appeal. Sweeney v. Erving, 228 U.S. 233 (1913), was a malpractice case arising in the District of Columbia wherein the plaintiff attempted to use the doctrine of res ipsa loquitur after he was burned by an X-ray machine. The court held that evidence of the defendant doctor to the effect that it may not be possible to guard against burns even with the exercise of due care justified a judgment in favor of the defendant. Such is not the state of the facts in the instant case.

In like manner Commercial Molasses Corp.

v. New York Tank Barge Corp., 314 U.S. 104 (1941), an admiralty case, held that a doctrine such as res ipsa loquitur would not be applicable to the sinking of a barge where there was no evidence of unseaworthiness even after the barge was raised and examined.

Petitioner cites two airplane crash cases, Morrison v. LeTourneau, 138 F.2d 339 (5th Cir. 1943) and Chapman v. United States, 194 F.2d 974 (5th Cir. 1952), where res ipsa loquitur was not applied where it was also shown that the planes crashed in bad weather and with mechanical difficulties.

The Petitioner's reliance upon Stevens v. Barnard, 512 F.2d 876 (10th Cir. 1975), is also misplaced. In that case the Court of Appeals refused to apply res ipsa loquitur in an airplane crash. The facts recite that the trial judge, applying Oklahoma law, felt that res ipsa loquitur was not applicable against a defendant who repaired the aircraft. This holding was proper in that the aircraft repairer was not in exclusive control of the

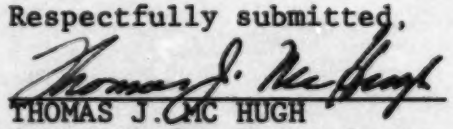
airplane when it crashed; therefore, there could be other reasons for the incident other than negligence of the defendant.

The cases relied upon by the Petitioner are interpretations of the law as applied by jurisdictions other than the State of Arizona. Moreover, Petitioner's authority rests upon facts which are inapposite to the instant case.

CONCLUSION

The Petition for Certiorari should be denied as this case deals solely with the application of Arizona law. On its facts it is not in conflict with any decision of this court nor any court of appeals. Moreover, as this petition does not involve important questions of Federal law, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that three copies of the foregoing Opposition to Petition for a Writ of Certiorari have been mailed to:

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